

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-2051

To be argued by
HENRY J. BOITEL, ESQ.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S

Docket No. 75-2051

UNITED STATES OF AMERICA,
Appellee,

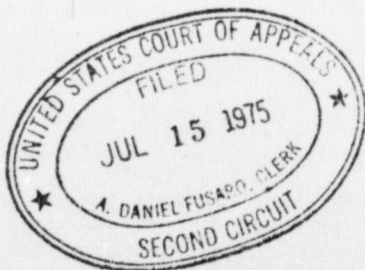
-vs.-

JOHN FRANZESE, ET AL.,
Appellants.

On Appeal From The United States District Court
For The Eastern District Of New York

BRIEF IN BEHALF OF APPELLANT
NICHOLAS POTERE

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UNITED STATES COURT OF APPEALS
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Docket No. 75-2051

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-vs.-

JOHN FRANZESE, ET AL.,

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On Appeal From The United States District Court
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BRIEF IN BEHALF OF APPELLANT
NICHOLAS POTERE

Preliminary Statement

Nicholas Potere appeals from an Order of the United States District Court entered against him on March 12, 1975, denying a motion, pursuant to 28 U.S.C. § 2255, to vacate the judgment of conviction entered against him herein on April 17, 1967.

Questions Presented for Review

1. Did the newly discovered evidence require the Court to grant an evidentiary hearing?
2. Should the government have been required to produce the undisclosed informant for examination by the defense, or, in the alternative, should the government have been directed to file with the District Court, under seal, any and all information it had in its possession concerning and derived from the informant in question with respect to his knowledge of the facts of this case?

Statement of Facts

In April, 1966, a Federal grand jury in the Eastern District of New York charged the appellant and his co-defendants (Franzese, Crabbe, Matera and Florio) in an eight count indictment. Six of the eight counts related to two separate bank robberies. The first occurred on July 30, 1965, in Queens County, and the second occurred on August 13, 1965 in Nassau County. The seventh count charged that the defendants, on September 15, 1965, received the proceeds of a bank robbery which had been committed in Salt Lake City, Utah. The eighth count charged the defendants with conspiracy to rob federally insured banks.

Potere was convicted under Counts 2 and 4 (placing lives in jeopardy during the robbery of federally insured banks - 18 U.S.C. § 2113[d]), Count 7 (receiving property

stolen from a federally insured bank - 18 U.S.C. § 2113 [c]), and Count 8 (conspiracy to rob federally insured banks - 18 U.S.C. §§ 371 and 2). Potere was sentenced to concurrent terms of imprisonment of fifteen years on each of Counts 2 and 4, and to additional concurrent terms of imprisonment of ten years and five years as to Counts 7 and 8, respectively. The conviction was affirmed, sub. nom. United States v. Franzese, 392 F. 2d 954 (2d Cir., 1968), cert. denied, sub. nom. Giordano v. United States, 394 U.S. 310 (1969). Potere surrendered to commence serving his sentence on August 25, 1969. On or about November 20, 1973, he was released on parole. He continues to be on parole as of the filing of the instant brief, and will remain on parole until the year 1984.*

On or about October 23, 1974, the co-defendant, John Franzese, who remains in custody pursuant to the sentence imposed upon him herein, moved in the District Court for an Order pursuant to 28 U.S.C. § 2255. In support of that application, there was submitted to the District Court, inter alia, the affidavit of Eleanor Cordero, the wife of one of the government's principal trial witnesses (A. 13-19). Mrs. Cordero, inter alia, confessed her participation in the bank

* It is clear that parole is a restraint upon liberty which confers upon a parolee the standing to raise a claim under the federal habeas corpus jurisdiction, Jones v. Cunningham, 371 U.S. 236 (1963).

robbery scheme (A. 14), revealed her actual knowledge that another alleged accomplice (Anne Massineo) had not participated in the robbery scheme (A. 15), revealed her husband's admissions to her that he and the other three government bank robber witnesses had "concocted a story to involve the Polisis as the masterminds of the robberies"**(A. 16), and that, to her knowledge, the testimony of the bank robber witnesses with regard to participation and assistance from the so-called Franzese group was fabricated (A. 17-19).

See also: Lyons Affidavit, at A. 5-9.

On December 10, 1974, the defendant Potere joined in the pending motion of the co-defendant Franzese (A. 25-40).

During the subsequent course of the proceedings, Mrs. Cordero filed a supplementary affidavit re-affirming and elaborating upon the contentions of her initial affidavit (A. 66-8). Additionally, there was filed a supporting affidavit of her daughter, Stephanie Cordero (A. 69). A further supplementary affidavit of Mrs. Cordero was filed on or about March 10, 1975 (A. 92-3).

A detailed analysis of the documents filed in

** As this Court will recall, the government first prosecuted and convicted Salvatore and Anthony Polisi based upon the testimony of three of these bank robber witnesses. This Court reversed the conviction of Anthony Polisi, United States v. Polisi, 416 F. 2d 573 (1969), upon the ground of suppression of evidence by the government, and Polisi was never retried. The indictment against him was subsequently dismissed.

support and in opposition to the motion is contained in the brief of the co-appellant, John Franzese, filed in this Court. That analysis is, respectfully, adopted by the appellant Potere, pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure.

On March 12, 1975, the District Court (Mishler, C.J.) denied the motion in an opinion (A. 94-103). Judge Mishler's opinion did not deny that Mrs. Cordero's version of events exculpated Franzese and Potere. Likewise, he did not deny that, if true, Mrs. Cordero's allegations established that Franzese and Potere were convicted upon perjured testimony. Instead, Judge Mishler relied upon the easiest and weakest course of determination, summarized in the concluding paragraph of his opinion as follows:

"In a motion for a new trial the Court is required to evaluate the strength of the testimony to determine whether such testimony would properly produce a different result in the event of retrial. United States v. Puco, 338 F. Supp. 1252 (S.D.N.Y., 1972), aff'd, 461 F. 2d 846 (2d Cir., 1972) and 493 F. 2d 1399 (2d Cir., 1974). In making this determination the Court reviewed the extensive and intensive cross-examination by the defendants' counsel of government witnesses exploring all the motives for testifying and introducing impeaching evidence and attacking their credibility. The Court is satisfied that the testimony of Mrs. Cordero, as outlined in her affidavit, would have little, if any, effect on the credibility of Mr. Cordero and the other government witnesses. Her testimony would not produce a different verdict in the event of retrial. The motion to vacate the judgment of conviction pursuant to 28

U.S.C. § 2255 is in all respects
denied and it is SO ORDERED."
(A. 102-3)

Argument

POINT I

THE DEFENDANTS SHOULD HAVE BEEN
GRANTED AN EVIDENTIARY HEARING.
IF MRS. CORDERO'S ALLEGATIONS
WERE ESTABLISHED TO BE TRUE, THEN
THE JUDGMENT OF CONVICTION SHOULD
HAVE BEEN VACATED.

Pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, we adopt the arguments contained in the brief of the co-appellant Franzese. Additionally, we respectfully urge this Court that the interests of justice and the appearance of justice required that the requested relief be granted.

This Court is well aware that the four government witnesses, without whom a conviction was impossible in this case, were, themselves, the admitted bank robbers. They, concededly, gave their testimony in the expectation that they would receive leniency from the government and from the Court. That expectation was fulfilled in every respect. There can be no doubt that, as a matter of law, the testimony of such witnesses is highly suspect. United States v. Projansky, 465 F. 2d 123, 139 (2d Cir., 1972).

It is respectfully submitted that a sense of justice is profoundly offended when the application of a legal rule of thumb conflicts with basic common sense.

The jury in the present case deliberated for several days before convicting the defendants. Other juries in other cases have thoroughly refused to believe the same bank robber witnesses.*** Moreover, these same prosecution witnesses obviously falsified a case against Anthony Polisi, whose conviction this Court was compelled to reverse, in United States v. Polisi, 416 F. 2d 573 (2d Cir., 1969).

As noted supra, Polisi was never retried by the government, although he had originally been given a sentence of fifteen years imprisonment. Now, on top of all of this, the wife of the most forceful prosecution witness, Cordero, has clearly placed the brand of perjury upon the testimony of all of those witnesses. She, admittedly, was an integral participant in the bank robbery scheme. She has denied categorically and absolutely any participation on the part of anyone other than the four bank robber witnesses and herself. She has repudiated her own husband's efforts to exculpate her.

In short, what is left in this case upon which

*** In People v. Florio, Queens Co. Indictment No. 1708/66, where the defendants Florio, Crabbe, Matteo and Franzese were tried for Murder upon the testimony of Cordero, Parks and Zaher, the defendants were acquitted following a jury trial in December, 1967. In People v. Franzese, Nassau Co. Indictment No. 33412, where the defendants Franzese and Matera were charged with Conspiracy, Robbery and related crimes, based upon the testimony of Cordero, Parks and Smith, both defendants were acquitted.

rational men of good will can rely for the purpose of concluding that justice has been done? We respectfully urge this Court to carefully review the history of the proceedings in this case and the most recent evidence sought to be adduced before the District Court. We are confident that, upon such a review, this Court will conclude that the judgment of conviction should be vacated or, at least, that an evidentiary hearing should have been granted to the defendants by the District Court. As is provided in Rule 2 of the Federal Rules of Criminal Procedure: "These Rules are intended to provide for the just determination of every criminal proceeding."

POINT II

THE DISTRICT COURT SHOULD HAVE ORDERED DISCLOSED TO THE DEFENSE THE IDENTITY OF THE GOVERNMENT'S ALLEGED INFORMANT OR, ALTERNATIVELY, THE DISTRICT COURT SHOULD HAVE DIRECTED THE GOVERNMENT TO FILE WITH THE COURT, UNDER SEAL, ANY AND ALL INFORMATION IT HAD IN ITS POSSESSION CONCERNING AND DERIVED FROM THE INFORMANT WITH RESPECT TO HIS KNOWLEDGE OF THE FACTS OF THIS CASE.

Disclosure of the identity of the informant or, alternatively, disclosure to the Court of information possessed by the government concerning the informant, was requested in the motion papers filed in behalf of the appellant Potere (A. 39-40). The Court's opinion denying the motion failed to make any mention of that request.

In this Court's opinion upon the direct appeal in this case, this Court dealt with the failure of the trial court to order disclosure with regard to the informant, United States v. Franzese, 392 F. 2d 954 at 961-3. It is clear that, prior to the arrest of the defendants herein, an undisclosed informer claimed to the F.B.I. that Mrs. Cordero was an actual participant in the bank robbery scheme, a role which the bank robbers at the present trial attributed to one Anne Massineo. This Court found that the District Court's denial of disclosure was a justifiable exercise of discretion in that "...the incremental value of evidence by the informer was outweighed by the opposing considerations, especially the great dangers to him indicated by what the 'fear' testimony of Smith, Cordero and Parks had revealed." (392 F. 2d at 962).****

In deciding that Mrs. Cordero's testimony would not, at a new trial, shift the tide of reasonable doubt against the prosecution, the trial judge improperly failed to take into consideration the apparently corroborative role which the undisclosed informant would play in supporting Mrs. Cordero's allegations. If that informant was close

**** With regard to the "fear" rationale, it is significant that, despite the passage of years, and despite the fact that the bank robber witnesses have been "out on the street" there has been no claim that any harm or attempt at harm has befallen them.

enough to the robbery scheme to know that Mrs. Cordero had participated in it, he may well have been close enough to know that the defendants had not participated in it. It is respectfully submitted that the government's refusal to provide the defense with the identity of the informant or to provide the Court with all information in its possession concerning the informant's knowledge of this case, constituted a clear violation of due process of law.*****

Conclusion

For all of the above reasons, it is respectfully submitted that the newly discovered evidence advanced by the defense entitled the defense to an evidentiary hearing and to disclosure of information in the possession of the government with regard to the undisclosed informant.

Respectfully submitted,

HENRY J. BOITEL, ESQ.
Attorney for Appellant
Nicholas Potere

July 14, 1975

***** In United States v. Franzese, 392 F. 2d 954 at 963, fn. 11, this Court noted: "The trial court examined the F.B.I. intra-office memoranda as to the informer and found that they were not producible at the instance of the defendants. We have likewise done this and agree. We add that the information as to Mrs. Cordero is exceedingly vague." In contrast to what was examined by this Court and by the District Court in prior proceedings in this case, we have asked either for the production of the informant or for disclosure by the government as to all of its knowledge concerning the informant - not merely that which had been reduced to certain "F.B.I. intra-office memoranda."

Certificate of Service

HENRY J. BOITEL, being an attorney duly admitted to practice law in the Courts of the State of New York hereby certifies that on July 14, 1975 he served a copy of the Brief in Behalf of Appellant Nicholas Potere upon the United States Attorney for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York 11201, the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Dated: New York, New York
July 15, 1975


HENRY J. BOITEL

